Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

NOS. 76-6221 AND 76-1194

In the Supreme Court of the United States

OCTOBER TERM, 1976

BENJAMIN A. FUSCO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY A. SPAGNOLO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
SARA CRISCITELLI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-6221

BENJAMIN A. FUSCO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 76-1194

ANTHONY A. SPAGNOLO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-8a)[1] is reported at 546 F. 2d 1117.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1976. A petition for rehearing was denied on January 27, 1977. The petition for a writ

---

[1]"Pet. App." designates the Appendix to the petition in No. 76-1194 (Spagnolo).

of certiorari in No. 76-6221 was filed on February 24, 1977. The petition for a writ of certiorari in No. 76-1194 was not filed until February 28, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether extortion to force the sale of an interest in a company receiving materials traveling in interstate commerce affected commerce within the meaning of the Hobbs Act, 18 U.S.C. 1951.

2. Whether the trial court's instructions to the jury concerning accomplice testimony interfered with the jury's fact-finding function.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner Spagnolo was also convicted of one count of obstruction of justice, in violation of 18 U.S.C. 1503. On the extortion count, petitioner Fusco was sentenced to one year's imprisonment and petitioner Spagnolo to three years' imprisonment. On the obstruction count, Spagnolo was sentenced to three years' imprisonment, one year to be served concurrently with his other sentence, one year consecutive to that sentence, and one year suspended. The court of appeals affirmed (Pet. App. 3a-8a).[2]

---

[2]Co-defendant Anthony Falvo was also convicted of violating 18 U.S.C. 1951 and 18 U.S.C. 1503. He was sentenced to concurrent two-year terms of imprisonment. The court of appeals affirmed, and Falvo has petitioned for a writ of certiorari (No. 76-6723, filed May 13, 1977).

Ron Bridges and Robert Dodson were partners in a construction company located in Northern Virginia (Tr. 129-130). The company received supplies, machinery, and equipment that was produced outside the State of Virginia and that traveled in interstate commerce (Tr. 131, 222-223, 437-438, 444-445, 464-466, 699, 701-704, Gov't. Exs. 4-6). Bridges supplied money for investment and was a personal guarantor on $5,000 worth of equipment (Tr. 129-130). Dodson did not have sufficient personal credit in the Northern Virginia area and needed the backing of a photocopy firm, ABS Duplicators, Inc., and of Bridges as a co-signer, in order to obtain credit from suppliers and merchants (Tr. 593-594).

Petitioner Spagnolo had previously been a co-owner with Bridges of ABS Duplicators (Tr. 120-122). In February 1973, Bridges agreed to buy out Spagnolo's interest for $24,000, to be paid in monthly installments of $1,000 (Tr. 122-124, 126). In August 1974, Spagnolo visited ABS Duplicators while Bridges was away and accepted a check for $1,500 from an employee, to cover both the August payment pursuant to the earlier agreement, and a personal loan. He was warned to hold the check because it was drawn on an account that lacked sufficient funds to cover the sum, but he deposited it for collection anyway. It bounced (Tr. 913-915).

On September 3, 1974, Bridges and a friend, Monte Jones, visited Spagnolo at a construction site where the latter was erecting an apartment house (Tr. 144-145). While Bridges and Spagnolo were talking, two men drove up, "dressed like they just stepped off a James Cagney movie set" (Tr. 149), wearing dark suits, black shirts, and white ties; they were introduced by Spagnolo simply as "a couple of Sicilian friends of his" (Tr. 150). Bridges identified them as petitioner Fusco and co-defendant Falvo (Tr. 183-184). Spagnolo, Bridges, and the other

two men proceeded to a basement apartment in the building (Tr. 153), where Spagnolo handed Bridges a sales agreement for his stock rights and interest in the R.S. Dodson Construction Company, for consideration of $1 (Tr. 159). According to Bridges, Spagnolo told him if he did not sign the agreement they would put him "in a pine box" (Tr. 170-171). Falvo took a sawed-off shotgun out of a gun case and pointed it at Bridges; Fusco drew back his jacket to reveal a revolver (Tr. 173-175). After these and additional threats by Spagnolo Bridges signed the agreement (Tr. 181); he also wrote another $1,500 check made out to Spagnolo (Tr. 182-190).

Monte Jones corroborated Bridges' testimony concerning persons present, the threats made, and the presence of the red gun case (Tr. 334-343). A student working for Spagnolo at the construction site also identified Fusco and Falvo (Tr. 500), testified to seeing a black gun case (Tr. 504, 506-507, and said that Spagnolo indicated to him that "he did a favor for Mr. Dodson" and that they scared Bridges (Tr. 510-511). A former employee of both Bridges and Spagnolo testified that Spagnolo told her how he had scared Bridges, that Bridges sold the company to him for $1, and that there was a shotgun involved (Tr. 388-389, 393-394).

Dodson testified that Spagnolo encouraged him to consider purchasing Bridges' share of the construction company (Tr. 521-522, 531-532) and that Spagnolo helped Dodson prepare the sales agreement and Bridges' resignation from the corporation (Tr. 541, 543). Dodson further stated that Spagnolo, in Dodson's presence, instructed Falvo on the methods to be used to force Bridges to sign the agreement (Tr. 546-549, 551), including the statement that if Bridges proved recalcitrant, Falvo should hang him out of his fourth floor office window by his feet (Tr. 552), and that Spagnolo's act in buying Bridges out, and the use of threats of violence, were done with Dodson's knowledge and consent (Tr. 632-635).

Spagnolo, Fusco, and Falvo, testifying on their own behalf, denied that pressures or threats were directed against Bridges.

ARGUMENT

1. The court of appeals correctly held that the evidence was sufficient to make out a Hobbs Act violation. There is no claim in this case that "extortion" was not practiced on Bridges; the only claim is that the extortion did not affect interstate commerce within the meaning of that Act. The evidence shows, however, that Bridges supplied the greater portion of financial backing for the construction firm involved in the extortion. That firm received supplies and materials in interstate commerce, and the effect of the withdrawal of Bridges' financial support and credit standing was sufficient to constitute the minimal effect on commerce necessary to meet the statute's commerce requirement. See *Stirone* v. *United States*, 361 U.S. 212, 215. *United States* v. *Hathaway*, 534 F. 2d 386, 396 (C.A. 1); *United States* v. *Amato*, 495 F. 2d 545 (C.A. 5); *United States* v. *Gill*, 490 F. 2d 233 (C.A. 7), certiorari denied, 417 U.S. 968; *United States* v. *Tropiano*, 418 F. 2d 1069 (C.A. 2), certiorari denied, 397 U.S. 1021; *Carbo* v. *United States*, 314 F. 2d 718, 732 (C.A. 9).[4]

Petitioner Spagnolo's contention (Pet. No. 76-1194, pp. 3-4) that the Hobbs Act is directed only at "labor racketeering" or "professional gangsterism" rather than "isolated incidents" was not clearly raised below, and the court

---

[4]Some courts have found the jurisdictional element to be met by the fact that a "realistic probability" existed that the transaction would affect commerce. *United States* v. *Staszcuk*, 517 F. 2d 53, 60 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 837. *United States* v. *Pranno*, 385 F. 2d 387 (C.A. 7), certiorari denied, 390 U.S. 944; *Hulahan* v. *United States*, 214 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856.

of appeals therefore did not discuss it. In any event, the absence of any definition of "racketeering" in the Hobbs Act, and that statute's unqualified condemnation of extortion affecting interstate commerce, demonstrate that the extortion practiced by petitioners in this case is within the statute. The act is not confined to labor racketeering: "its prohibitions were applicable to all groups" (*United States* v. *Yokley*, 542 F. 2d 300, 303 (C.A. 6)), and it applies to single incidents of extortion affecting commerce whether or not they are part of repetitive patterns. See, *e.g.*, *United States* v. *Staszcuk*, 517 F. 2d 53 (C.A. 7); *United States* v. *Pranno*, 385 F. 2d 387 (C.A. 7), certiorari denied, 390 U.S. 944. Although the Sixth Circuit in *Yokley*, *supra*, and the Ninth Circuit in *United States* v. *Culbert*, 548 F. 2d 1355, 1357, have recently held, contrary to the decisions of other circuits, that the Act is limited to "racketeering"— a term they do not, and we cannot, precisely define—we submit that this important issue should be resolved on a record on which it was clearly raised and decided.

2. Petitioner Fusco contends that the court's accomplice instruction interfered with the jury's function. The court instructed the jury that "Dodson was an aider and abettor, an accomplice, an unindicted accomplice, as far as the Court is concerned, * * * "(Tr. of Jury Charge, p. 31). But this statement was simply describing Dodson's own testimony as a foundation of the court's warning that accomplice testimony should be received with caution (*id.* at 41). There is no material risk that the jury would have understood the court to be telling it that a crime had been committed or to be directing it to return a guilty verdict (Tr. of Jury Charge, p. 31). Moreover, the court specifically instructed the jury on at least seven separate occasions (Tr. of Jury Charge pp. 4-5, 6, 7, 8, 33, 42, 43), that the jury alone was the trier of fact and that the court's instructions were not evidence. Thus, as in *United States* v. *Thompson*, 476 F. 2d 1196, 1200 (C.A.

7), certiorari denied, 414 U.S. 918: "The jury [could not] have failed to discern that the purpose of the instruction was to alert it to the need for caution in weighing the testimony, all to the benefit of the defendant."

Petitioner Fusco's (Pet. No. 76-6221, pp. 10-12) reliance upon *Henderson* v. *United States*, 202 F. 2d 400 (C.A. 6), and upon *United States* v. *Balodimas*, 177 F. 2d 485 (C.A. 7), is misplaced. In *Henderson*, which was reversed for a cumulation of several prejudicial errors, the instruction expressly charged that co-defendants, who had pending pleas of not guilty, were accomplices as a matter of law. In *Balodimas*, the charge included, with respect to two witnesses, the unsupported statement that they "have openly admitted that they are law violators and have openly admitted the part that they had in the commission of the crime" (177 F. 2d at 487), when in fact neither admitted knowledge of or acquiescence in the illegal scheme.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
SARA CRISCITELLI,
Attorneys.

JUNE 1977.

DOJ-1977-06